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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 518

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

SABINE TRANSPORTATION COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 9, 1942
CERTIORARI GRANTED DECEMBER 14, 1942

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TRANSCRIPT OF RECORD.

UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT.

SABINE TRANSPORTATION COMPANY, INC.,
Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition to Review the Decision of the United States Board of Tax Appeals.

DOCKET ENTRIES.

Sabine Transportation Company, Inc., Petitioner,
vs. Docket No. 103869.
Commissioner of Internal Revenue, Respondent.

Appearances.

For Taxpr.:
James H. Yeatman.

For Comm'r:
W. H. Payne.

1940.

July 22—Petition received and filed. Taxpayer notified. Fee paid.
July 22—Copy of petition served on General Counsel.
Aug. 20—Answer filed by General Counsel.

1940.

Aug. 20—Request for hearing in Houston, Texas, filed by General Counsel.

Aug. 28—Notice issued placing proceeding on Houston, Texas, calendar. Answer and request served.

Dec. 3—Hearing set January 6, 1941, in Houston, Texas.

1941.

Jan. 10—Hearing had before Mr. Smith on merits. Stipulation as to facts filed. Briefs due March 11, 1941. Reply briefs due March 26, 1941.

Feb. 1—Transcript of hearing January 10, 1941, filed.

Mar. 8—Brief filed by taxpayer. March 12, 1941, copy served on General Counsel.

Mar. 11—Brief filed by General Counsel.

Mar. 24—Reply brief filed by taxpayer.

May 26—Memorandum opinion rendered. Smith, #5. Decision will be entered for the respondent. March 26, 1941, copy served.

May 26—Decision entered. Smith, #5.

Aug. 8—Notice of the withdrawal of Wright Matthews as counsel filed.

Aug. 8—Notice of the appearance of James H. Yeatman as counsel filed.

Aug. 9—Petition for review by U. S. Circuit Court of Appeals, 5th Circuit, with assignments of error filed by taxpayer.

Aug. 21—Proof of service filed by taxpayer.

Sept. 4—Agreed praecipe filed. Proof of service thereon.

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2 PETITION.

July 22, 1940.

(Title Omitted.)

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commis-

sioner of Internal Revenue in his notice of deficiency (DALLAS, IRA:90D-H) dated June 25, 1940, and as a basis of its proceeding alleges as follows:

1. The petitioner is a Delaware corporation with principal office at Houston Avenue and Canal, Port Arthur, Texas. The return for the period here involved was filed with the collector for the first district of Texas.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on June 25, 1940.

3. The taxes in controversy are income taxes for the calendar year 1938 and in the amount of $13,250.00.

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

(a) Respondent failed to allow as a dividends paid credit the payment by petitioner during the year 1938 of $530,000.00 of indebtedness evidenced by notes which had been in existence prior to December 31, 1937.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) On December 28, 1937, in accordance with a resolution of the Board of Directors, petitioner executed and issued ten year, eight per cent notes aggregating $530,000.00 in payment of a dividend declared by the directors.

(b) During the calendar year 1938 said notes were retired by the payment in cash of $530,000.00 plus accrued interest to the date of payment.

(c) In accordance with the provisions of Section 27(a)(4) of the Internal Revenue Code, petitioner used the retirement of said notes as a dividends paid credit in its income tax return for the calendar year 1938.

Wherefore, the petitioner prays that this Board may hear the proceeding and determine that the payment of the $530,000.00 of notes during 1938 should be allowed as a dividends paid credit.

WRIGHT MATTHEWS,
(Wright Matthews),
Counsel for Petitioner.

Niels Esperson Building,
Houston, Texas.

State of Illinois,
County of Cook. ss.

F. J. Blaise, C. P. A., being first duly sworn, deposes and says that he is assistant Secretary and Assistant Treasurer of Sabine Transportation Company, the petitioner named in the foregoing petition, and as such is duly authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein, and that the statements contained therein are true.

F. J. BLAISE.

Sworn to and subscribed before me this 16th day of July, 1940.

V. K. CRAYCROFT,
(Seal) Notary Public.

My Commission expires Dec. 31, 1940.

4 Treasury Department,
Internal Revenue Service,
June 25, 1940.

Office of
Internal Revenue Agent in Charge,
Dallas Division.

DALLAS IRA:90D-H.

Sabine Transportation Company, Inc.,
Post Office Drawer 1500,
Port Arthur, Texas.

Sirs:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1938 discloses a deficiency of $13,250.00 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned,

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, 422 Federal Building, Dallas, Texas, for the attention of C:RLP. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest

period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
GUY T. HELVERING,
Commissioner,
(Signed) By B. W. WILDE,
Internal Revenue Agent in Charge.

Enclosures:
Statement.
Form of waiver.

RTG:JW.

5 STATEMENT.

DALLAS IRA:90D-H.

Sabine Transportation Company, Inc.,
Post Office Drawer 1500,
Port Arthur, Texas.

Tax Liability for the Taxable Year Ended December 31, 1938.

	Liability	Assessed	Deficiency
Income Tax	$162,844.42	$149,594.42	$13,250.00

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated February 27, 1940; to your protest dated April 24, 1940; and to the statements made at the conference held on May 29, 1940.

A copy of this letter and statement has been mailed to your representative, Mr. Wright Matthews, 11th Floor, Esperson Building, Houston, Texas, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

Adjustments to Net Income.

Net income as disclosed by return		$875,179.22
Unallowable deductions and additional income:		
(a) 1937 operating expense	$ 1,464.40	
(b) Additional revenue	4,031.18	
(c) Capital expenditures	18,793.00	
(d) Depreciation	12,920.62	
(e) Capital stock tax	2,193.00	39,402.20
Total		$914,581.42
Nontaxable income and additional deductions:		
(f) Other income	$ 7,032.09	
(g) Maintenance expense	407.84	
(h) Administrative expense	4,670.88	12,110.81
Net income adjusted		$902,470.61

Explanation of Adjustments.

(a) to (h), inclusive. These items represent adjustments to which you have agreed, as evidenced by waiver form 870, executed under date of February 27, 1940.

Dividends paid credit claimed in the amount of $21,879.48, being 2½% of $875,179.22, the adjusted net income shown on your return, has been decreased by $13,254.48 to $8,625.00, it being held that the amount of $530,000.00, ten-year notes issued by you in December, 1937 in payment of a dividend declared in 1937 and allowed as divi-

dends paid credit in 1937, does not constitute a portion of the dividends paid in the year 1938 for the determination of the dividends paid credit in 1938, the year in which the notes issued in 1937 were paid.

Dividends paid credit claimed was determined as follows:

Cash dividends paid	$345,000.00
Dividend carry-over from 1937	22,405.45
Amount used to retire indebtedness	530,000.00
Total	$897,405.45
Adjusted net income	$875,179.22
Dividends paid credit claimed (2½% of $875,179.22)	$ 21,879.48
Dividends paid credit allowed: Cash dividends paid	$345,000.00
2½% of $345,000.00	$ 8,625.00

As the dividends paid credit for 1937 did not equal the undistributed adjusted net income for such year there was no dividends paid carry-over from 1937 to 1938.

Computation of Tax.

Income Tax.

Net income	$902,470.61
Adjusted net income	$902,470.61
Income tax at 19% on $902,470.61	$171,469.42
Less: Dividends paid credit (2½% of $345,000.00)	8,625.00
Correct income tax liability	$162,844.42

Income tax assessed:		
Original, account #400274	$144,404.57	
Additional, April 26, 1940 #529006	5,189.85	
Total assessed		149,594.42
Deficiency of income tax		$ 13,250.00

7 ANSWER.

Received Aug. 20, 1940.

Filed Aug. 20, 1940.

(Title Omitted.)

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar year 1938 for which the Commissioner has determined a deficiency in the amount of $13,250.00.

4.-(a) Denies that in determining the deficiency asserted against petitioner for the year in question the Commissioner committed error as alleged in subparagraph (a) of paragraph 4 of the petition.

5.-(a), (b) and (c). Denies each and every allegation contained in subparagraphs (a), (b) and (c) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied and that the determination of the Commissioner be approved.

(Signed) J. P. WENCHEL, TBS.
(J. P. Wenchel),
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
JAMES L. BACKSTROM,
Division Counsel,
WILFORD H. PAYNE,
Special Attorney,
Bureau of Internal Revenue.

WHP/ees-8-14-40.

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9 STIPULATION OF FACTS.

Jan. 10, 1941.

(Title Omitted.)

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, that the following facts may be taken as true, subject to the right of either party to introduce other or further evidence not inconsistent therewith.

1. The petitioner is a Delaware corporation with its principal office located at Houston Avenue and Canal, Port Arthur, Texas. The return for the taxable year, in-

volved was filed with the Collector of Internal Revenue for the First Collection District of Texas, Austin, Texas.

2. The notice of deficiency, a true copy of which is attached to the petition herein, was mailed to petitioner on June 25, 1940.

3. The tax involved in this proceeding is the corporation income tax for the calendar year 1938, for which year the Commissioner has proposed a deficiency against petitioner in the amount of $13,250.00.

4. During the year 1937, petitioner declared and paid cash dividends of $30,000.00 on its outstanding common stock. In addition thereto further dividends, payable in obligations of the corporation, were authorized at a duly called meeting of petitioner's board of directors held December 28, 1937, at which the following action was taken:

"Sabine Transportation Company, Inc.
Copy of Dividend Resolutions other than Case.

We, the undersigned, being all the directors of Sabine Transportation Company, Inc., hereby waive notice of the time, place and purpose of a special meeting of the Board of Directors of said company, and consent that the same shall be held at the office of the Sabine Towing Company, Inc., in the city of Port Arthur, Texas, on Tuesday, December 28, 1937, at 10:00 o'clock A. M.

(Signed) C. B. WATSON,
(Signed) RAWLEIGH WARNER,
(Signed) D. D. IRWIN,
(Signed) M. T. BALL,
(Signed) L. L. ABSHIRE,
(Signed) R. P. SMITH,

Pursuant to the foregoing waiver of notice, a special meeting of the Board of Directors of Sabine Transportation Company, Inc., was held at the office of the Sabine Towing Company, Inc., in the City of Port Arthur, Texas, on Tuesday, December 28, 1937, at 10:00 o'clock A. M. Messrs. M. T. Ball, L. L. Abshire and R. P. Smith were present, and Messrs. C. B. Watson, Rawleigh Warner and D. D. Irwin were absent. The meeting was called to order by M. T. Ball, President, and L. L. Abshire, Secretary, acted as such.

The Chairman then presented the matter of the declaration of dividends upon the common stock of the company. Thereupon the following resolutions were presented, and on motion duly seconded and carried were adopted:

Resolved: that a dividend of Thirty-Five dollars and thirty-three and one-third cents ($35.33-1/3) per share upon all of the common stock of the company issued and outstanding be, and the same hereby is declared, payable to stockholders of record as of this date, as follows:

The Pure Oil Company	7,650 Shares	$270,300.00
Sabine Towing Company, Inc.	7,350 Shares	259,700.00
		$530,000.00

Such dividend shall be paid by the issuance and delivery of ten year eight per cent notes, dated December 28, 1937, aggregating the above amounts, to each of the respective stockholders, and issued in such denominations as the stockholders may elect; all of such notes being of equal priority and validity and the President and Treasurer of this Company are hereby authorized to execute and deliver such notes as provided herein, the amounts and denominations of such notes in accordance with the election

of the respective stockholders being shown in the following form:

Sabine Transportation Company, Inc.

Note.

No. ..... $.....

Dated December 28, 1937. Due December 28, 1947.

For value received Sabine Transportation Company, Inc., hereby promises to pay to the order of ....., in the office of the Company in Port Arthur, Texas, on the 28th day of December, 1947 ..... Dollars ($.....) and to pay interest thereon from December 28, 1937, at the rate of eight per cent (8%) per annum, payable semi-annually in equal installments on June 28 and December 28 of each calendar year until such principal sum shall be paid. This note is one of eight notes aggregating the total amount of $530,000.00 and numbered and in the amounts and payable as follows:

(1)	The Pure Oil Company	$270,300.00
(2)	Sabine Towing Company, Inc.	37,100.00
(3)	Sabine Towing Company, Inc.	37,100.00
(4)	Sabine Towing Company, Inc.	37,100.00
(5)	Sabine Towing Company, Inc.	37,100.00
(6)	Sabine Towing Company, Inc.	37,100.00
(7)	Sabine Towing Company, Inc.	37,100.00
(8)	Sabine Towing Company, Inc.	37,100.00

all notes being dated December 28, 1937, due December 28, 1947, bearing interest at the rate of eight per cent (8) per annum, beginning December 28, 1937, payable semi-annually, all of said notes being equal in priority and validity with respect to both principal and interest. On

default in payment of any semi-annual installment of interest on one or more of said notes described herein, the principal amount with accrued interest of all of said notes unretired shall become immediately due and payable without notice, which is hereby expressly waived.

The privilege is reserved by Sabine Transportation Company, Inc., of retiring this note or of paying any part thereof, without notice, on the first day of any calendar month by payment of the principal amount or any part thereof with interest to the date of retirement or part payment.

This note is negotiable, assignable and transferable by the payee in the usual manner, but in case of each transfer the transferor shall notify Sabine Transportation Company, Inc., at its office in Port Arthur, Texas, in writing, and until so notified, the maker hereof may treat the original payee or the last successive transferee of which it has notice, as the legal holder hereof for all intents and purposes, and payment of interest or principal to such holder shall fully discharge the maker hereof of all obligations in the premises.

SABINE TRANSPORTATION
COMPANY, INC.,

(Signed) By M. T. BALL,
President,

....,
Treasurer.

There being no further business to come before the meeting, it was adjourned.

(Signed) L. L. ABSHIRE,
Secretary.

Chicago, Illinois, ..., 1937.

Pursuant to Article III, Section (d) of the by-laws, whereby the action taken at directors' meetings at which not less than three members are present shall become effective and binding when approved in writing by not less than two additional members of the Board, the undersigned directors of Sabine Transportation Company, Inc., hereby signify that they have read the foregoing record of special meeting of directors held on Tuesday, December 28, 1937, at 10:00 o'clock A. M. in the office of the Sabine Towing Company, Inc., in the City of Port Arthur, Texas, and do hereby approve the action taken at such meeting.

(Signed) C. B. WATSON,
(Signed) RAWLEIGH WARNER,
(Signed) D. D. IRWIN."

Notes for the sum of $530,000.00 were duly issued in 1937 by petitioner to its stockholders of record as of December 28, 1937, in accordance with the provisions of the resolution.

5. In its corporation income and excess-profits tax return filed for the calendar year 1937, petitioner reported as distributions to its stockholders, out of earnings or profits of the taxable year or out of earnings or profits accumulated since February 28, 1913, the aforesaid cash dividends of $30,000.00 and the dividend paid in obligations of the corporation amounting to $530,000.00, or total distributions during the year of $560,000.00. Petitioner claimed in that return as dividends paid credit the following:

Taxable distributions (the sum of the above $30,000.00 and $530,000.00 dividends)	$560,000.00
Dividend carry-over from the preceding taxable year	81,562.60
Total dividends paid credit	$641,562.60

The undistributed profits surtax computation, as reflected in said return, was as follows:

Net income for income tax computation	$740,345.10
Normal tax	109,891.77
Adjusted net income	$630,453.33
Dividends paid credit	641,562.60
Undistributed net income	None
Total normal tax and surtax	$109,891.77

6. The only adjustments made by the Commissioner in petitioner's 1937 return related to items which are not material to the issue presented here. Additional income for the year 1937 was determined and a deficiency in normal tax in the amount of $2,256.43, and a deficiency in surtax on undistributed profits in the amount of $117.40 were asserted against petitioner and agreed to by it, or an aggregate additional income tax for that year of $2,373.83.

7. The ten-year dividend notes, aggregating $530,000.00 issued by petitioner under the foregoing resolution of December 28, 1937, were paid in cash by it during its taxable year 1938, as follows:

Date of Payment	The Pure Oil Co.	Sabine Transportation Co.	Total
1-31-38	$ 5,607.73	$ 5,387.82	$ 10,995.55
2-28-38	6,008.80	5,767.61	11,771.41
3-31-38	5,867.93	5,637.80	11,505.73
3-31-38	33,150.00	31,850.00	65,000.00
4-30-38	30,600.00	29,400.00	60,000.00
4-30-38	6,185.53	5,942.95	12,128.48
5-31-38	6,390.12	6,139.53	12,529.65
5-31-38	40,800.00	39,200.00	80,000.00

Date of Payment	The Pure Oil Co.	Sabine Transportation Co.	Total
6-29-38	39,895.38	38,330.84	78,226.22
7-30-38	14,640.05	14,065.92	28,705.97
8-30-38	24,940.90	23,962.82	48,903.72
9-29-38	56,218.56	54,014.71	110,233.27
Totals	$270,300.00	$259,700.00	$530,000.00

8. In its corporation income and excess-profits tax return filed for the year 1938, petitioner reported distributions to its stockholders and claimed dividends paid credit in the following amount:

Cash dividends declared and paid during the year	$345,000.00
Dividend carry-over from preceding taxable years	22,405.45
Amounts used to pay or to retire indebtedness	530,000.00
Dividends paid credit claimed	$897,405.45

The item of $530,000.00 above represents the ten-year dividend notes issued by petitioner in 1937, which were paid in 1938.

9. In the computation of its normal income tax, as reflected in its return for 1938, petitioner claimed as a credit the amount of $21,879.48, being two and one-half percent of the adjusted net income reported in the return amounting to $875,179.22, said amount being lower than the total dividends paid credit claimed of $897,405.45.

10. In determining petitioner's Federal income tax for the year 1938 the Commissioner increased taxable net income from $875,179.22 as reported in the return to $902,470.61, the details of which are set forth in the deficiency notice, which adjustments are not contested by petitioner. In computing the income tax liability the Commissioner disallowed that portion of the dividends paid credit consisting of the amounts used to pay the indebtedness of $530,000.00 and the amount representing the dividend carry-over from the preceding taxable years of $22,405.45 claimed in the return for 1938. In determining the resulting deficiency in tax, the Commissioner decreased the aforesaid credit of $21,879.48 claimed by petitioner by the amount of $13,254.48 to $8,625.00, the latter amount being two and one-half percent of the cash dividends of $345,000.00 paid during the year 1938. Petitioner does not contest the Commissioner's disallowance of the item claimed as a dividend carry-over of $22,405.45.

11. Thus the only question to be determined by the Board is whether, in computing its income tax for the taxable year 1938, petitioner is entitled, in the determination of the dividends paid credit, to use the sum of $530,000.00 as an amount used to pay or to retire indebtedness, said sum representing the amount paid in 1938 in the satisfaction of the ten-year dividend notes issued by petitioner in 1937.

12. If the Board should determine that the said item of $530,000.00 is not allowable in the determination of the dividends paid credit for the year 1938, then it is agreed that the correct deficiency in tax is the amount set forth in the deficiency notice. On the other hand, if the Board should conclude that payment of the aforesaid obligations in the year 1938, amounting to $530,000.00, must be taken into account, in whole or in part, in determining the dividends paid credit for that year, then it is agreed that the

resulting deficiency in tax may be computed under Rule 50 of the Board's Rules of Practice.

(Sgd.) WRIGHT MATTHEWS,
Counsel for Petitioner,

(Sgd.) J. P. WENCHEL, J. H. Y.
(J. P. Wenchel),
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

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18 MEMORANDUM OPINION.

(Title Omitted.)

Wright Matthews, Esq., for the petitioner.

Wilford H. Payne, Esq., for the respondent.

SMITH:

This is a proceeding for the redetermination of a deficiency in income tax for 1938 in the amount of $13,250. The question in issue is whether in computing its income tax for the taxable year 1938 the petitioner is entitled in the determination of the dividends paid credit to use the sum of $530,000 as an amount used to pay or to retire indebtedness, said sum representing the amount paid in 1938 in satisfaction of the 10-year dividend notes issued by the petitioner in 1937.

The facts have all been stipulated and are incorporated herein by reference as our findings of fact.

The petitioner is a Delaware corporation with its principal office in Port Arthur, Texas. It filed its income and excess-profits tax returns for 1937 and 1938 with the collector of Internal Revenue at Austin.

During 1937 the petitioner declared and paid cash dividends of $30,000 on its outstanding common stock. In addition thereto a further dividend of $35.33-1/3 per share upon all its common stock payable in obligations of the corporation was declared at a directors' meeting held December 28, 1937, and was payable to stockholders of record as of that date as follows:

	Shares	Amount
The Pure Oil Corporation	7,650	$270,300
Sabine Towing Co., Inc.	7,350	259,700
Total		$530,000

Pursuant to the terms of the resolution the dividend was paid by the issuance and delivery of petitioner's 10-year, eight percent notes due December 28, 1947, to each of the respective stockholders in the amounts stated aggregating the sum of $530,000.

In its Federal income and excess-profits tax return filed for 1937 the petitioner reported as distributions to its stockholders out of earnings and profits a cash dividend of $30,000 and the dividend paid in its obligations amounting to $530,000, or aggregate distributions for the year of $560,000. This amount, plus a dividend carry-over of $81,562.60, making a total of $641,562.60, was claimed in that return as a dividends paid credit. In the computation of the undistributed profits surtax, as reflected in the return, the deduction of the aggregate credit of $641,562.60 from the adjusted net income of $630,453.33, shown therein, left no undistributed net income. Certain adjustments were made by the respondent in the 1937 return with respect to other items which are not material to the issue involved in the instant proceeding. As a result thereof, a deficiency in normal tax of $2,256.43 and a deficiency in

surtax of $117.40 were asserted against petitioner and agreed to by it for the year 1937.

The 10-year dividend notes aggregating $530,000 issued in 1937 were paid in full by petitioner to its two stockholders, in cash, during the taxable year 1938, the year involved in this proceeding. In its return for 1938 the petitioner reported distributions to its stockholders and claimed dividends paid credit as follows:

Cash dividends declared and paid during the taxable year	$345,000.00
Dividend carry-over from preceding taxable years	22,405.45
Amounts used to pay or to retire indebtedness	530,000.00
Dividends paid credit claimed	$897,405.45

The item of $530,000, above, represents the 10-year dividend notes issued in 1937 and paid in 1938.

In determining petitioner's Federal income tax liability for 1938 the respondent disallowed that portion of the dividends paid credit, which had been claimed in the return, consisting of the amounts used to retire the indebtedness of $530,000. He also disallowed the amount representing the dividend carry-over of $22,405.45. The petitioner does not contest the respondent's disallowance of the item of dividend carry-over of $22,405.45.

The only question for the determination of the Board is whether in computing its income tax for the taxable year 1938 the petitioner is entitled, in the determination of the dividends paid credit, to include the sum of $530,000 as an amount used to pay or to retire indebtedness, that sum representing the amount paid in 1938 in satisfaction of the 10-year dividend notes issued by the petitioner in 1937.

The parties have stipulated that if the petitioner is not entitled to include in its dividends paid credit of 1938 the amount of $530,000, which was included in the dividends paid credit for 1937, the deficiency determined by the respondent for 1938 in the amount of $13,250 is correct.

The question presented by this proceeding is the same as that which was considered by the Board and ruled adversely to the taxpayer's contentions in *Spokane Dry Goods Co.*, 43 B. T. A. 793. In accordance therewith we hold that the petitioner is not entitled to include in its dividends paid credit for 1938 the $530,000 in question.

Decision will be entered for the respondent.

Entered: May 26, 1941.

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20 DECISION.

(Title Omitted.)

Pursuant to the determination of the Board, as set forth in its Memorandum Opinion, entered May 26, 1941, it is

Ordered and Decided: That there is a deficiency in income tax for the calendar year 1938 in the amount of $13,250.00.

(Signed) CHARLES P. SMITH,
(Seal) Member.

Enter: Entered May 26, 1941.

21 PETITION FOR REVIEW.

Filed Aug. 9, 1941.

(Title Omitted.)

To the Honorable Judges of said Court:

Now comes the petitioner, Sabine Transportation Company, Inc., by its attorney, James H. Yeatman (Vinson, Elkins, Weems & Francis), and files this, its petition for review, by the United States Circuit Court of Appeals for the Fifth Circuit, of the decision of the United States Board of Tax Appeals entered May 26, 1941.

Jurisdiction.

The petitioner is a Delaware corporation and has its principal office and place of business in Port Arthur, Texas. Petitioner's return for the calendar year 1938, the year in controversy, was filed with the Collector of Internal Revenue at Austin, Texas, which is within the Fifth Judicial Circuit of the United States.

On June 25, 1940, the respondent, in accordance with Section 27 (a) of the Revenue Act of 1938, advised the petitioner by registered mail that the determination of its income tax liability for the year ended December 31, 1938, disclosed a deficiency of $13,250.00. Thereafter the petitioner duly filed with the United States Board of Tax Appeals a petition for redetermination of the deficiency disclosed in the respondent's said letter of June 25, 1940, and the respondent duly filed an answer to the said petition. The proceeding was heard by the United States Board of Tax Appeals on January 10, 1941. The proceeding was submitted to the Board of Tax Appeals on a stipulation of facts, and on May 26, 1941, the Board of

Tax Appeals entered its decision that there is a deficiency in petitioner's income tax liability for the calendar year 1938 in the amount of $13,250.00.

The Nature of the Controversy.

The controversy between the parties is whether petitioner is entitled under Section 27 (a) (4) of the Revenue Act of 1938 to include in its dividends paid credit provided by said section the sum of $530,000.00 which it paid on its indebtedness during the year 1938. This indebtedness arose under the following circumstances:

On December 28, 1937, petitioner, acting through its Board of Directors, declared a dividend amounting to $530,000.00. This dividend was made payable in obligations of the petitioner, and on December 28, 1937, petitioner issued its ten year eight per cent (8%) promissory notes in the aggregate principal amount of $530,000.00 to its stockholders in payment of the dividend so declared.

The net income as disclosed by petitioner's return for 1938 was $875,199.22, and therein petitioner claimed under Section 27 of the Revenue Act of 1928 a dividends paid credit of $897,405.45, which was arrived at as follows:

Cash Dividends Declared and Paid During the Year	$345,000.00
Dividend Carry-Over from Preceding Taxable Years	22,405.45
Amount Paid on Indebtedness Represented by Notes Issued to Stockholders in 1937 in Payment of Dividends	530,000.00
Total	$897,405.45

and, as provided in Section 13 (c) (2) b of the Revenue Act, reduced its tentative normal tax by $21,879.40, said sum being two and a half per cent (2½%) of the adjusted net income of $875,179.22 shown on the return, said latter amount being lower than the total dividends paid credit claimed of $897,405.45.

The respondent made an audit of petitioner's return for the year 1938, and he increased the net income reported therein from $875,179.22 to $902,470.61. The adjustments resulting in said increase in income were conceded by the petitioner. In addition to increasing petitioner's taxable net income, the respondent in computing petitioner's dividends paid credit under Section 27 of the Revenue Act of 1938 excluded therefrom the aforesaid sum of $530,000.00, as well as the dividend carry-over from the preceding taxable years of $22,405.45, and allowed petitioner as a dividends paid credit only the amount of the cash dividend paid by petitioner during the year of $345,000.00.

Petitioner did not contest before the Board of Tax Appeals the disallowance of the credit of $22,405.45, representing the dividends paid credit carry-over from the preceding tax year. Petitioner did contest, however, the correctness of the Commissioner's determination in excluding from its dividends paid credit the sum of $530,000.00 which petitioner paid on its indebtedness during the year 1938. The Board of Tax Appeals held that the said $530,000.00 was not includable in petitioner's dividends paid credit for the year 1938. The only question at issue in this Court is whether the Board erred in so holding.

Designation of Court of Review.

The petitioner, Sabine Transportation Company, Inc., being aggrieved by the conclusions of law contained in the opinion of the Board of Tax Appeals, promulgated May

26, 1941, and by the final decision entered by it on May 26, 1941, pursuant to said opinion, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Fifth Circuit.

Assignments of Error.

The petitioner's assignments of error are as follows:

I.

The Board of Tax Appeals erred in finding and deciding that the sum of $530,000.00 which petitioner used in 1938 to pay and retire the ten year notes which it gave to its stockholders in 1937 can not be used and is not includable in determining the amount of the "dividends paid credit" to which petitioner is entitled under Section 27 of the Revenue Act of 1938, in computing its income tax liability for said year.

II.

The Board of Tax Appeals erred in failing to find and decide that the sum of $530,000.00 which petitioner used in 1938 to pay and retire the ten year notes which it gave to its stockholders in 1937 is includable in determining the amount of the "dividends paid credit" to which petitioner is entitled under Section 27 of the Revenue Act of 1938, in computing its income tax liability for said year.

III.

The Board of Tax Appeals erred in redetermining and deciding that the sum of $530,000.00, which petitioner used in 1938 to pay or retire the indebtedness represented by the ten year notes given to its stockholders in 1937, is not includable in determining the amount of the "divi-

dends paid credit" to which petitioner is entitled for said year under Section 27 of the Revenue Act of 1938, and in finding and deciding that petitioner's tentative tax for 1938, computed in accordance with Section 13 of the Revenue Act of 1938, should not be reduced by two and one-half per cent (2½%) of said sum of $530,000.00 or $13,250.00 in arriving at its correct tax liability for said year.

IV.

The Board of Tax Appeals erred in redetermining that petitioner was liable for any deficiency in income tax for the year 1938.

V.

The Board of Tax Appeals erred in failing to redetermine that petitioner did not owe any deficiency in income tax for the year 1938.

Wherefore, petitioner prays that this Honorable Court may review said findings, opinion, decision and order of the United States Board of Tax Appeals and reverse and set aside the same, and that this Honorable Court direct the entry of decision by the said United States Board of Tax Appeals in favor of the petitioner, redetermining and finding that there is no deficiency in its income tax for the year ended December 31, 1938.

Petitioner prays for such relief as it is entitled to receive, and prays that the Clerk of the United States Board of Tax Appeals be directed to transmit and deliver to the Clerk of this Honorable Court certified copies of all documents necessary and material to the presentation of the foregoing petition for review as required by the Rules of this Honorable Court and by the Statutes made and pro-

vided, and petitioner prays for such other and further relief as is mete and proper in the premises.

SABINE TRANSPORTATION
COMPANY, INC., Petitioner,
By JAMES H. YEATMAN,
(James H. Yeatman),
Counsel for Petitioner.

c/o Vinson, Elkins, Weems & Francis,
11th Floor Esperson Bldg.,
Houston, Texas.

The State of Texas,
County of Harris. ss.

James H. Yeatman, being duly sworn, deposes and says that he is attorney of record for the petitioner and that as such attorney he is authorized to verify the foregoing petition for review and assignments of error; that he knows the contents of the foregoing petition for review and assignments of error; that to the best of his knowledge, information and belief the statements are true and the assignments of error are well taken and intended to be argued.

JAMES H. YEATMAN,

Subscribed and Sworn to before me this the 6th day of August, A. D. 1941.

(Seal)

HAZEL BAUER,
Notary Public in and for
Harris County, Texas.

28 Filed Aug. 21, 1941.

(Title Omitted.)

To Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent, Commissioner of Internal Revenue, Washington, D. C.

You are hereby notified that the petitioner, Sabine Transportation Company, did on the 9th day of August, 1941, file with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Fifth Circuit of the decision of the Board of Tax Appeals heretofore rendered in the above entitled cause. A copy of the petition for review and the assignments of error as filed is attached hereto and served upon you.

Dated this 11th day of August, A. D. 1941.

JAMES H. YEATMAN,
(James H. Yeatman),
Counsel for Petitioner.

c/o Vinson, Elkins, Weems & Francis,
11th Floor Esperson Bldg.,
Houston, Texas.

Personal service of the foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein is hereby acknowledged this the 13th day of August, 1941.

J. P. WENCHEL,
(J. P. Wenchel),
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

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PRAECIPE.

Filed Sept. 4, 1941.

(Title Omitted.)

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, in connection with Petition for Review heretofore filed by the Petitioner in the above cause, as required by law and by the rules of said Court, copies, duly certified as correct, of the following records and documents:

1. The docket entries of the proceedings before the Board of Tax Appeals.

2. Pleadings before the Board of Tax Appeals as follows:

(a) Petition for redetermination including annexed copy of notice of deficiency.

(b) Answer of Respondent to petition for redetermination.

3. Stipulation of Facts entered into by the parties through Counsel.

4. Memorandum opinion of the Board of Tax Appeals.

5. Decision of the Board of Tax Appeals.

6. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

7. This Praecipe.

Dated this 4th day of Sept., 1941.

JAMES H. YEATMAN,
Attorney for Petitioner on Review.

VINSON, ELKINS, WEEMS & FRANCIS,
11th Floor Esperson Building,
Houston, Texas.

Personal service of the foregoing Praecipe is hereby acknowledged this 4th day of Sept., 1941, and agreed to.

J. P. WENCHEL, C. A. K.
Chief Counsel for the Bureau of Internal Revenue, Counsel for Respondent.

CERTIFICATE.

(Title Omitted.)

I, B. D. GAMBLE, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 31, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 16th day of Sept., 1941.

B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

(Seal)

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and submission

Extract from the Minutes of May 28th, 1942

No. 10077

SABINE TRANSPORTATION COMPANY, INC.

versus

COMMISSIONER OF INTERNAL REVENUE

On this day this cause was called, and, after argument by James H. Yeatman, Esq., for petitioner, and Arthur A. Armstrong, Esq., Special Assistant to the Attorney General for respondent, was submitted to the Court.

Opinion of the court

Filed June 30, 1942

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 10077

SABINE TRANSPORTATION COMPANY, INC., PETITIONER

versus

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for Review of Decision of the United States Board of Tax Appeals (District of Texas)

June 30, 1942

Before SIBLEY, HUTCHESON, and HOLMES, Circuit Judges

HUTCHESON, Circuit Judge: Submitted upon stipulation as to the facts,[1] the Board, following its decision in Spokane Drygoods

[1] In 1937, taxpayer, a Delaware Corporation having two stockholders, Pure Oil Corporation and Sabine Towing Company, Inc., declared and paid on its outstanding common stock, cash dividends of $30,000, and a further dividend of $530,000 by the issuance and delivery of its 10 year 8% notes. In its federal income and excess profits tax return for 1937 the petitioner reported

Co. v. Commissioner,[3] sustained the determination of the Commissioner that in computing its income tax for the taxable year 1938, the taxpayer was not entitled under 27 (a) (4),[4] to take a dividends paid credit for the $530,000 used to pay or retire the notes issued in 1937 as dividends paid on its obligation.

Taxpayer is here insisting, that by the plain mandate of the section it is entitled to the credit claimed and that both this and the Spokane Case were wrongly decided. The Commissioner, standing on the Spokane Case and on the regulation that case approved, insists that the order of the Board was right and must be affirmed. We do not think so. We think it clear; that the Spokane Case was wrongly decided by Board and court; that the dissenting opinion of Board member Hill, clearly and correctly stated the law of that case; and that in the Pacific Flush Tank Case,[5] the Board while in terms differentiating, in effect overruled its prior decision. We agree with what it there said. "The terms of the statute as applicable to the facts of this case, are so plain and unambiguous as to require in our opinion no resort to construction in order to ascertain its meaning. However, if it could be said that the application of the literal meaning of the statute leads to results which should be avoided, that is, the granting of a

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the cash dividends and the dividends paid in its obligations, and they were allowed as dividends paid credits." During the tax year, 1938, the year involved in this proceeding, the 10 year dividend notes were paid to its stockholders in cash and in its return for 1938, taxpayer reported these distributions to stockholders and claimed a dividends paid credit, under Sec. 27 (a) (4), Revenue Act of 1938, on account of the sums used to pay and retire them. Respondent disallowed the claim and taxpayer brought the matter to the Board.

[3] Section 27 of Revenue Act of 1936:

Sec. 27. Corporation Credit for Dividends Paid.

(a) Dividends Paid Credit in General.—For the purposes of this title, the dividends paid credit shall be the amount of dividends paid during the taxable year. * * *

(d) Dividends in Obligations of the Corporation.—If a dividend is paid in obligations of the corporation, the amount of the dividends paid credit with respect thereto shall be the face value of the obligations, or their fair market value at the time of the payment, whichever is the lower. * * *

43 B. T. A. 793, Affd., 125 F. (2d) 895.

[4] "Sec. 27. Corporation Dividends Paid Credit:

"(a) Definition in General. As used in this title with respect to any taxable year the term 'dividends paid credit' means the sum of: (1) * * * (2) * * * (3) * * * and (4) 'Amounts used or irrevocably set aside to pay or to retire indebtedness of any kind, if such amounts are reasonable with respect to the size and terms of such indebtedness.' As used in this paragraph the term 'indebtedness' means only an indebtedness of the corporation existing at the close of business on December 31, 1937, and evidenced by a bond, note, debenture, certificate of indebtedness, mortgage, or deed of trust, issued by the corporation and in existence at the close of business on December 31, 1937, or by a bill of exchange accepted by the corporation prior to and in existence at the close of business on such date. Where the indebtedness is for a principal sum, with interest no credit shall be allowed under this paragraph for amounts used or set aside to pay such interest."

[5] Pacific Flush Tank Co. v. Commissioner, 45 B. T. A. 69.

double tax benefit, and that this statute should be construed in the light of the purpose and intent of Congress in enacting same, we nevertheless * * * conclude that even if the allowance of the credit claimed here would result in duplicating in whole or in part a tax benefit to the petitioner, it nevertheless appears clear that Congress intended to and did expressly grant such credit. And we further conclude that Art. 27 (a) (3) of Regulations 101, purporting to deny such credit is contrary to the statute and is therefore a nullity as applied to the facts of this case."

We think it clear that in attempting, by speculating as to what Congress intended to do except as that intent was expressed in the statute, to rationalize out of the section the comprehensive words which specifically grant the deduction, the Commissioner is attempting to have us arrogate to ourselves the function of rewording rather than of construing and applying the statute.[5] The construction of a statute to make it carry out the intent its words import is one thing. The construction of it to bring it nearer to the thought of administrator or court, or of some particular section of public opinion, as to what Congress intended or ought to have intended, or that the law would better serve its purpose if it were drawn that way,[6] is quite another. However, we need not further labor the point here, for in *Helvering v. Credit Allowance Association*, April 27, 1942, — U. S. —, the Supreme Court, rejecting the same kind of reasoning as to a dividends paid credit claimed under Section 27 (b) of the Revenue Act of 1936, and declaring invalid a regulation which contravened the plain terms of the statute, has set the matter at rest. Definitely reaffirming the principle that it is for the courts not to write but to enforce a statute,

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[5] "Courts and Administrative agencies are bound to enforce the plain words of the statute although there may be reason to think in view of the general legislative purpose that some other provision would have met with favor, if the legislature had called it to mind." Commissioner of Internal Revenue v. Windrow, 89 F. (2d) (9, 110 A. L. R. 1251.

[6] "A legislative act in the United States is not as in some countries, a mere general outline by a party or group in power, of the purposes it wishes to accomplish, to be expanded, implemented and given effect by its administrators in accordance with the general purposes of its proponents. A fundamental fact in American political life has always been that in the struggle here for laws as means, to make law as liberator effective, there have always been differing opinions, as to the wisdom, propriety and scope of proposed new and controversial laws. Laws as finally enacted here, are usually the result of a compromise, or at least of an adjustment of these conflicting views.

"Because this is and always has been so, it can be usually said of our laws, that the general, not the partial or partisan will, speaks in them. It is because this is so, that canons of statutory interpretation and construction require that statutes must be construed and given effect, in accordance with the language chosen for the expression, of this compromise and adjustment of views, and not in accordance with the purposes or views, of either the proponents or the opponents of the legislation, which have not been given expression in the statute." Fleming v. Belo, 121 F. (2d) @ 212-13, Affd. June 9, 1942, — U. S. —.

the court said: "But we cannot, as the Government suggests, read into the section, as it stood when the transaction took place, an intent derived from the policy disclosed by the subsequent amendment. We shall not burden this opinion by extended reference to the legislative history of the Act of 1936. It is enough to say that it is inconclusive and, to some extent, supports the arguments of both parties. But whatever may be said of the policy behind the statute's provisions, we are not at liberty to disregard the direct and unambiguous language of subsection (f)." The principal there announced has controlling force here. Congress, for reasons of its own, in working out a compromise or adjustment, of the very controversial questions raised by the policy of, in effect, taxing corporations on dividends unpaid and of allowing them credits on those paid or what was regarded as the equivalent, drew the dividends paid statutes in the terms in which we find them. The taxpayer, conforming to the statute, paid dividends in its obligations in 1937. Still conforming to the statute it paid these obligations in 1938 and claimed the dividends credit the statute allowed, for the payment or retirement of "indebtedness of any kind." It is not for the commissioner or the courts to deny the taxpayer the deduction that Congress has granted him. The order is reversed and the cause is remanded for further and not inconsistent proceedings.

Reversed and remanded.

Judgment

Extract from the Minutes of June 30th, 1942

No. 10077

SABINE TRANSPORTATION COMPANY, INC.

versus

COMMISSIONER OF INTERNAL REVENUE

This cause came on to be heard on the petition of Sabine Transportation Company, Inc., for a review of a decision of the United States Board of Tax Appeals, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the order of the said United States Board of Tax Appeals in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said United States Board of Tax Appeals for further and not inconsistent proceedings.

Order denying rehearing

Extract from the Minutes of August 13th, 1942

No. 10077

SABINE TRANSPORTATION COMPANY, INC.

versus

COMMISSIONER OF INTERNAL REVENUE

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

Clerk's certificate

UNITED STATES OF AMERICA,
United States Circuit Court of Appeals, Fifth Circuit

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 33 to 44 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 10077, wherein Sabine Transportation Company, Inc., is petitioner, and Commissioner of Internal Revenue is respondent, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 32 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 28th day of October, A. D. 1942.

OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1942

Supreme Court of the United States

No. 518, October Term, 1942

Order allowing certiorari

Filed December 14, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ:

U. S. GOVERNMENT PRINTING OFFICE: 1942